Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1256.

BOSTON AND MAINE RAILROAD,
Petitioner,

v.

EDWARD L. CABANA,
Respondent.

RESPONDENT-EMPLOYEE'S BRIEF AGAINST THE ISSUANCE OF THE WRIT OF CERTIORARI.

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BOSTON, MASS.

SUBJECT INDEX.

Citation of Cases.

Citation of Federal Rules of Civil Procedure.

(U. S. C. Title 28, Following Sec. 723 C)

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This is a petition for a writ of certiorari seeking review of a judgment entered in the Federal District Court for Massachusetts and affirmed by the Circuit Court of Appeals for the First Circuit by a unanimous opinion. Substantially all arguments set forth by the petitioner in its brief in support of the petition are dealt with in the opinion of the Circuit Court which appears on Pages 204 to 210 inclusive of the record.

All the contentions made by the petitioner under the first two reasons relied upon for the allowance of the writ are expressly discussed in the Circuit Court's well-reasoned opinion, and further discussion by the respondent herein is hardly required in view of the convincing manner with which they were discussed in this opinion.

Argument.

The petitioner assigns on Page 6 of its brief three reasons for the allowance of the writ prayed for. The only ground not heretofore discussed in the aforesaid opinion is contained under Paragraph 3 of the said reasons and will be considered in this brief.

One.

It is submitted that there was abundant evidence to warrant a finding that the petitioner herein was guilty of a breach of duty to the respondent-employee in regard to the condition of the lighting at the place where the respondent was injured.

A perusal of the record reveals ample support for the jury's finding, and the decision of the Circuit Court of Appeals discloses the substantial basis which warranted the finding of the jury on this aspect of the case. Nothing would be added by any further discussion of the evidence upon which the jury reached its finding in respect to the existence of the duty of the petitioner-employer to the respondent-employee and its negligent violation of that duty during the months that preceded this accident.

Two.

The darkness in and around the area of the engine house where the accident occurred was a causal factor in the happening of the accident and resulted in whole or in part in the injuries sustained by the respondent. *Tennant, Admr. v. Peoria & Pekin Union Ry. Co.*, 321 U. S. 29; *Tiller v. Atlantic Coast Line R. R. Co.*, January 15, 1945, Lawyers

Edition Advance Sheets, Vol. 89, Page 403; *Delaware L. & W. Co. v. Berry*, 48 Fed. (2d) 1052; *Underwood v. Louisville & Nashville R. R. Co.*, 131 Fed. (2d) 306; *Waddell vs. Chicago & E. I. R. Co.*, 142 Fed. (2d) 309.

(a) It is the contention of the respondent-employee that the hostler, in his position in the cab of locomotive No. 1426, did actually see a body move while backing, and before he came to a full stop, which warranted the jury in inferring that his failure to discern the respondent more clearly from the self same position prior thereto, was due to the prevailing darkness. Henry Cote, the hostler, on cross-examination (R. 162-166), testified in substance as follows:

> That he backed Engine No. 1426 (58½ feet long) from the turntable to the point of the accident, a distance of two and one-half times its length. That he backed it slowly and carefully at the rate of 3 miles per hour; that it was very dark at the entrance to Pit 48 and that there were no lights inside the engine house nor outside said engine house except the red and green lights on the turntable, the flood light having been discontinued. That he was on the right-hand side of the engine as it backed from the turntable (on the side where the accident occurred) with his head out and looking back as he backed. That he saw a body move, heard someone holler and then stopped. That he saw a man standing up—a figure of a man in an upright position.

The argument of the petitioner, that the cab seat in locomotive 1426 was so situated as to preclude the possibility of the hostler, fully seated in the cab, from seeing the respondent in the path in which he was backing, even though it was well illuminated, is untenable on the very testimony of the

hostler himself. His testimony that his head was out and that he was looking back as he backed, saw first a body move, then a man standing up—a figure of a man in an upright position, destroys the petitioner's argument based on the position of the cab seat and the construction of the cab. Not only was the hostler in a position as he backed, from which he could see but in the darkness therein prevailing according to his own testimony, he was able to discern a body move before he brought his locomotive to a full stop. He observed movement and saw the position of the respondent, and it was a reasonable inference that had the rear end of Pit 48 been illuminated in any manner whatsoever he would have seen the respondent in time to prevent this unhappy catastrophe. *Sweeting v. Penn. R. Co.*, 142 F. (2d) 611, 614.

(b) From the evidence of the respondent (R. 26) and the evidence of Henry Cote (R. 164), and from all the other evidence in the record, the jury could infer the mechanics of the accident. They also saw and observed the respondent on the stand. It is submitted that the jury would be abundantly warranted in inferring that were it not for the pitch darkness enveloping the area where the accident occurred, the respondent herein, in possession of all his faculties, walking erect at the time of the impact, would have seen the close proximity of the tender of the backing locomotive and would have been able, in time, by his own efforts to reach a position of safety. A slight movement would have taken him out of the path of the backing tender. It was readily inferable that the utter darkness prevailing at this point prevented him from seeing the close proximity of the backing tender and was the direct cause of his total unawareness of the approach of danger until too late to avert it. *Thomson v. Boles*, 123 Fed. (2d) 487, 493.

To be sure the respondent was never asked the direct question as to whether he had looked, but the fact that the respondent had looked was clearly warranted by his answers to Questions 104 and 105 on his direct examination (Record Page 28) which were as follows:

> Q.104. Now as engine 1426 approached was there any light on the tender or any part of the engine? A. There was no light on it.
>
> Q.105. What if any light was on the tender or locomotive 1426? A. There was no light at all.

(c) The fact that the jury by its verdict on Count 2 of the respondent's Bill of Complaint exonerated the hostler from all negative negligence in connection with the backing of locomotive No. 1426 reveals that the jury, having seen all parties and heard all evidence, inferred that the darkness was the dominant factor in the happening of this accident. By its verdict on Count 2 the jury showed it regarded no intervening human agency operating on the darkness as a condition entering into the stream of causation. By its verdict the jury clearly demonstrated that it did not consider darkness as a mere condition but rather as an efficient proximate cause of the result.

Three.

The contention contained in the assigned reason No. 3 for the allowance of this writ is clearly without merit for the following reasons:

(a) All circumstances of the accident were fully explored in the trial before the District Court. The issue of causation was fully tried before the jury. Both under direct and cross examination counsel for the parties inquired into

every possible phase of the happening. Nowhere does the record disclose that a single objection was made by counsel for the petitioner on the ground that this evidence sought to be adduced did not conform to the pleadings in the case. The record is absolutely bare of any claim that inquiry into the possible causes of the accident should be confined exclusively to the inability of the hostler, Henry Cote, to see the respondent.

(b) An examination of the petitioner's Motion for Directed Verdict, (Pages 6 and 7 of the Record) does not reveal any claim for the allowance of the motion based upon the ground that there was a fatal variance between the cause as pleaded and the cause as proved. Ten grounds are set forth in support of this petitioner's general Motion for a Directed Verdict and the ground of variance is not implicit in any of the reasons assigned. Moreover, the petitioner's "Statement of Points To Be Relied Upon on Appeal" which is set forth in Pages 199 and 200 of the Record, does not disclose any claim expressly or by implication that the appellant therein relied on any claim of variance between the cause as alleged and the cause as proved.

Rule 50 of the Federal Rules of Civil Procedure in Subdivision (a) thereof contains a requirement that the Motion for a Directed Verdict shall state the specific grounds therefor. The reason for the rule is obvious. Orderly procedure requires that the Trial Judge be informed or apprized of the basis of all motions for directed verdicts so that in season, errors might be corrected or the cause disposed of in a manner that would not involve the Court in further unnecessary litigation. Sound justice requires such a rule and it would defeat the very purpose of the rule if the petitioner after trial for the first time were permitted to

raise as a reason for reversal a ground that had never prior thereto been claimed. A careful perusal of this record will reveal that there never was a suggestion that there was a fatal variance between the cause as pleaded and the cause that was established in evidence. A belated oral argument before the Circuit Court of Appeals not contained in the brief of the then appellant hardly meets the requirements of the Rule.

(c) The Circuit Court in its opinion (Pages 204 to 210 inclusive of Record) did not rule that the accident could not have been found to have been caused in whole or in part because of the inability of Henry Cote, the hostler, to see the respondent by reason of the darkness, in season to prevent the accident. It is submitted that the jury were warranted in finding that in the enveloping darkness that prevailed at the place where the accident occurred the inability of the hostler to see the respondent in time was a causal factor in the happening of the accident.

(d) If it appeared to the Circuit Court of Appeals that the evidence warranted a finding for the respondent only on the basis of the inability of the respondent to see rather than on the basis of the inability of the hostler, it might have well so ruled and affirmed the judgment after allowance of an amendment which would make the pleadings conform to the case that was tried. There was ample power in the Circuit Court to affirm the result conditioned on the allowance of an amendment which would conform to the evidence adduced at the trial. Rule 15, Sub-division (b) of the Federal Rules of Civil Procedure confers this authority on the Court. Substantial justice is thus effectuated and such a course would be usual procedure on the part of any Appellate Court under the authority of this rule. It would cer-

tainly be out of line with enlightened procedure to require the complete retrial of a cause that had been fully tried or to reverse a result after a trial where every possible issue had been litigated. The fact that the Circuit Court of Appeals in its order did not make any such requirement as a condition of its affirmation reveals without a shadow of a doubt that the Circuit Court of Appeals regarded this claim of variance on the part of the petitioner herein as captious and in nowise affecting the substantial rights of the parties. *Cabel v. United States*, 113 F. (2d) 998 (1940).

Respectfully submitted,

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